



BILLING CODE: 4310-55

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 21

[Docket No. FWS-R9-MB-2012-0037; FF09M21200-134-FXMB1231099BPP0]

RIN 1018-AY65

Migratory Bird Permits; Depredation Order for Migratory Birds in California

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Final rule.

SUMMARY: We revise the regulations that allow control of depredating birds in California. We specify the counties in which this order is effective, identify the species that may be taken under the order, add a requirement that landowners attempt nonlethal control, add a requirement for use of nontoxic ammunition, and revise the reporting required. These changes update and clarify the current regulations and enhance our ability to carry out our responsibility to conserve migratory birds.

DATES: This regulation change will be effective on **[INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**.

ADDRESSES: This final rule as well as supplementary information used in its development, such as the public comments received, is available at <http://www.regulations.gov> at Docket No. FWS–R9–MB–2012–0037.

FOR FURTHER INFORMATION CONTACT: Dr. George T. Allen at 703–358–1825.

SUPPLEMENTARY INFORMATION:

Background

The U.S. Fish and Wildlife Service is the Federal agency delegated the primary responsibility for managing migratory birds. This delegation is authorized by the Migratory Bird Treaty Act (MBTA, 16 U.S.C. 703 et seq.), which implements conventions with Great Britain (for Canada), Mexico, Japan, and the Soviet Union (Russia). We implement the provisions of the MBTA through regulations in parts 10, 13, 20, 21, and 22 of title 50 of the Code of Federal Regulations (CFR). Regulations pertaining to migratory bird permits are at 50 CFR 21; subpart D of part 21 contains regulations for the control of depredating birds.

A depredation order allows the take of specific species of migratory birds for specific purposes without need for a depredation permit. The depredation order at 50 CFR 21.44 allows county commissioners of agriculture to authorize take of designated species of depredating birds in California “as may be necessary to safeguard any

agricultural or horticultural crop in the county.” The current depredation order allows take of horned larks (*Eremophila alpestris*), golden-crowned sparrows (*Zonotrichia atricapilla*), white-crowned sparrows (*Zonotrichia leucophrys*), house finches (*Carpodacus mexicanus*), and “other crowned sparrows” where they cause agricultural damage.

On May 13, 2013, we published a proposed rule to update and clarify the regulations that carry out this depredation order (78 FR 27927). Our purpose was to bring the requirements of this depredation order in line with current regulations for other depredation orders under the MBTA and improve our ability to carry out our statutory responsibility to protect and conserve migratory birds.

Comments on the Proposed Rule

We received five sets of comments on the proposed rule (78 FR 27927, May 13, 2013).

Comment. The lack of use of the depredation order outside of Fresno, Merced, Napa, and Sonoma shows that it is used on a limited basis. This does not support the conclusion that it’s unnecessary outside of those four counties, instead it shows that it’s used judiciously and should remain available for any county that needs it, if nonlethal control methods prove ineffective.

Response. We do not wish to leave unused depredation orders in place or have them applicable in locations in which they have not been used. The lack of use of the depredation order outside the four counties for many years indicates that it is not needed there. Agricultural producers in counties outside those covered under the regulation can

seek depredation permits to address crop losses due to migratory birds (through the regional offices, see <http://www.fws.gov/migratorybirds/mbpermits/addresses.html>).

Comment. “The main culprit of damage is Horned Lark which accounts for approximately 90% of the damage followed by the Crowned Sparrows. Usually the damage occurs December through April. Horned larks usually feed on the exterior rows of the fields while sparrows feed in the interior of the field so damage is easily distinguishable. In Fresno County, the House Finch rarely causes issues in these crops but does occur in vineyards and similar crops from time to time.”

Response. We have reconsidered the likely distribution of horned larks, and will continue to allow their control under the depredation order.

Comment. “The proposed rule also requires that a landowner attempt to use nonlethal control of migratory bird depredation as recommended by the U.S. Department of Agriculture, Animal and Plant Health Inspection Service, Wildlife Services and that the county agriculture commissioner confirm that nonlethal measures have been undertaken to control or eliminate the problem prior to the use of lethal control. While Farm Bureau [California Farm Bureau Federation] supports the use of nonlethal methods when feasible, it is unclear what constitutes an “attempt.” It is important to recognize that lethal control can frequently be a significant part of a deterrent program. Often, nonlethal control methods become ineffective and without continued lethal control as a part of a vertebrate pest management program, nonlethal actions won’t work. With the proposed change, it is unclear whether lethal control methods could be on going.”

Response. We agree that lethal control may be necessary in some instances, so we have retained the regulations allowing for lethal control. However, we also believe it is necessary to try to reduce take of migratory birds through the use of nonlethal controls. It will be easy to report on nonlethal control methods tried, such as the use of netting, the use of abatement raptors, or the use of noisemakers.

Comment. “[A]griculture should be allowed monetary compensation for crop or livestock damage or loss caused by wildlife that agricultural operators are unable to control.”

Response. Compensation for agricultural losses due to migratory birds is neither provided for under the MBTA nor funded by Congress. The Federal Government does assist crop producers through the help from the U.S. Department of Agriculture, Animal and Plant Health Inspection Service’s Wildlife Services.

Changes to the Regulations

We revise § 21.44 to:

- (1) specify in which California counties this regulation is applicable (Fresno, Merced, Napa, and Sonoma);
- (2) identify the species that may be taken (horned larks, house finches, and white-crowned sparrows);
- (3) specify the times of year that they may be taken;
- (4) require that landowners attempt nonlethal control each year prior to the use of lethal control;
- (5) require the use of nontoxic ammunition; and

(6) update the requirement for reporting take under this depredation order.

These changes will bring the requirements of this depredation order in line with current regulations for other depredation orders under the MBTA and allow us to better carry out our statutory responsibility to protect and conserve migratory birds.

Changes from the Proposed Rule

The annual report on activities conducted under the depredation order will require the use of form 3–202–20–2144. We made this change to clarify the reporting requirement.

Based on comments received and the use of the order for horned larks, we add this species to this final rule and slightly change the period during which horned larks and white-crowned sparrows may be taken each year.

Required Determinations

Regulatory Planning and Review (Executive Orders 12866 and 13563).

Executive Order 12866 provides that the Office of Information and Regulatory Affairs (OIRA) in the Office of Management and Budget (OMB) will review all significant rules. OIRA has determined that this rule is not significant.

Executive Order 13563 reaffirms the principles of E.O. 12866 while calling for improvements in the nation's regulatory system to promote predictability, to reduce uncertainty, and to use the best, most innovative, and least burdensome tools for achieving regulatory ends. The executive order directs agencies to consider regulatory approaches that reduce burdens and maintain flexibility and freedom of choice for the public where these approaches are relevant, feasible, and consistent with regulatory

objectives. E.O. 13563 emphasizes further that regulations must be based on the best available science and that the rulemaking process must allow for public participation and an open exchange of ideas. We have developed this rule in a manner consistent with these requirements.

Regulatory Flexibility Act (5 U.S.C. 601 et seq.)

Under the Regulatory Flexibility Act (5 U.S.C. 601 et seq., as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA) of 1996 (Pub. L. 104-121)), whenever an agency is required to publish a notice of rulemaking for any proposed or final rule, it must prepare and make available for public comment a regulatory flexibility analysis that describes the effect of the rule on small businesses, small organizations, and small government jurisdictions. However, no regulatory flexibility analysis is required if the head of an agency certifies the rule will not have a significant economic impact on a substantial number of small entities.

SBREFA amended the Regulatory Flexibility Act to require Federal agencies to provide the statement of the factual basis for certifying that a rule will not have a significant economic impact on a substantial number of small entities. Other than a minimal change in the resources needed to address the reporting requirements, there are no costs associated with this regulations change.

We have examined this rule's potential effects on small entities as required by the Regulatory Flexibility Act. Because only four counties have made use of this depredation order, we believe no significant economic impacts to any small entities will result from the revisions. Any agricultural producers who qualify as small entities in those counties

could still seek relief from depredating birds under these revisions. Under the current regulations, the county commissioners of agriculture have needed to comply with a reporting requirement, and the changes to this requirement should add minimal burden. Because we have determined that this action will not have a significant economic impact on a substantial number of small entities, a regulatory flexibility analysis is not required.

This rule is not a major rule under the SBREFA (5 U.S.C. 804(2)). It will not have a significant impact on a substantial number of small entities.

- a. This rule does not have an annual effect on the economy of \$100 million or more.
- b. This rule will not cause a major increase in costs or prices for consumers, individual industries, Federal, State, tribal, or local government agencies, or geographic regions.
- c. This rule will not have significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of U.S.-based enterprises to compete with foreign-based enterprises.

Unfunded Mandates Reform Act

In accordance with the Unfunded Mandates Reform Act (2 U.S.C. 1501 et seq.), we have determined the following:

- a. This rule will not “significantly or uniquely” affect small governments. A small government agency plan is not required. The revisions will not have significant effects. This regulation will minimally affect small government activities by changing the reporting requirement under the depredation order.

b. This rule will not produce a Federal mandate of \$100 million or more in any year. It is not a “significant regulatory action.”

Takings

This rule does not contain a provision for taking of private property. In accordance with Executive Order 12630, a takings implication assessment is not required.

Federalism

This rule does not have sufficient Federalism effects to warrant preparation of a Federalism assessment under Executive Order 13132. It will not interfere with the States’ abilities to manage themselves or their funds. No significant economic impacts are expected to result from the changes in the depredation order.

Civil Justice Reform

In accordance with Executive Order 12988, the Office of the Solicitor has determined that the rule does not unduly burden the judicial system and meets the requirements of sections 3(a) and 3(b)(2) of the Order.

Paperwork Reduction Act of 1995

We may not conduct or sponsor and you are not required to respond to a collection of information unless it displays a currently valid OMB control number. Because this rule affects only four county government agencies in California, OMB approval under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 et seq.) is not required for the annual report under § 21.44(e).

National Environmental Policy Act

We have analyzed this rule in accordance with the National Environmental Policy Act (NEPA), 42 U.S.C. 432–437(f), and U.S. Department of the Interior regulations at 43 CFR 46. As outlined in 43 CFR 46.210(h), this regulations changes is categorically excluded from further NEPA analyses because it is a technical change that has primarily economic, social, individual, or institutional effects. This action will have neither a significant effect on the quality of the human or natural environment, nor unresolved conflicts concerning uses of available resources.

Government-to-Government Relationship with Tribes

In accordance with the President’s memorandum of April 29, 1994, “Government-to-Government Relations with Native American Tribal Governments” (59 FR 22951), Executive Order 13175, and 512 DM 2, we have determined that there are no potential effects on Federally recognized Indian Tribes from the regulations change. The regulations change will not interfere with Tribes’ abilities to manage themselves or their funds or to regulate migratory bird activities on Tribal lands.

Energy Supply, Distribution, or Use (Executive Order 13211)

This rule only affects depredation control of migratory birds, and will not affect energy supplies, distribution, or use. This action will not be a significant energy action, and no Statement of Energy Effects is required.

Compliance with Endangered Species Act Requirements

Section 7 of the Endangered Species Act (ESA) of 1973, as amended (16 U.S.C. 1531 et seq.), requires that “The Secretary [of the Interior] shall review other programs

administered by him and utilize such programs in furtherance of the purposes of this chapter” (16 U.S.C. 1536(a)(1)). It further states that the Secretary must insure that any action authorized, funded, or carried out is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of critical habitat (16 U.S.C. 1536(a)(2)). The regulations change will not affect listed species.

List of Subjects in 50 CFR Part 21

Exports, Hunting, Imports, Reporting and recordkeeping requirements,
Transportation, Wildlife.

Regulation Promulgation

For the reasons described in the preamble, we hereby amend subchapter B of chapter I, title 50 of the Code of Federal Regulations, as set forth below:

PART 21—MIGRATORY BIRD PERMITS

1. The authority citation for part 21 continues to read as follows:

Authority: 16 U.S.C. 703–712.

2. Revise § 21.44 to read as follows:

§ 21.44 Depredation order for horned larks, house finches, and white-crowned sparrows in California.

Horned larks (*Eremophila alpestris*), house finches (*Carpodacus mexicanus*), and white-crowned sparrows (*Zonotrichia leucophrys*) may be taken in Fresno, Merced, Napa, and Sonoma Counties in California if they are depredating on agricultural or horticultural crops. Take of birds under this order must be done under the supervision of the county agriculture commissioner. You do not need a Federal permit for this depredation control as long as you meet the conditions below, but a depredation permit (see § 21.41 in this subpart) is required for take of other migratory bird species, or for take of horned larks or white-crowned sparrows from May 1 through October 31.

(a) *When is take allowed under this depredation order?*

(1) Horned larks and white-crowned sparrows may be controlled from November 1 through April 30.

(2) House finches may be controlled at any time.

(b) *Use of nonlethal control.* Each season, before lethal control may be undertaken, the landowner must attempt to use nonlethal control of migratory bird depredation as recommended by the U.S. Department of Agriculture, Animal and Plant Health Inspection Service, Wildlife Services. The county agriculture commissioner must confirm that nonlethal measures have been undertaken to control or eliminate the problem prior to the landowner using lethal control.

(c) *Ammunition.* Except when using an air rifle or an air pistol, if firearms are used to kill migratory birds under the provisions of this regulation, the shooter must use nontoxic shot or nontoxic bullets to do so. See § 20.21(j) of this chapter for a listing of approved nontoxic shot types.

(d) *Disposition of carcasses.* Specimens useful for scientific purposes may be transferred to any entity authorized to possess them. If not transferred, all carcasses of birds killed under this order must be buried or otherwise destroyed. None of the above migratory birds killed, or the parts thereof, or the plumage of such birds, may be sold or removed from the area where killed.

(e) *Annual report.* Any county official acting under this depredation order must provide an annual report to the Regional Migratory Bird Permit Office using FWS Form 3–202–20–2144. The address for the Regional Migratory Bird Permit Office is in § 2.2 of subchapter A of this chapter, and is on the form. The report is due by January 31st of the year after control activities are undertaken.

Dated: September 17, 2013.

Michael J. Bean,

Acting Principal Deputy Assistant Secretary for Fish and Wildlife and Parks.

[FR Doc. 2013-26064 Filed 10/31/2013 at 8:45 am; Publication Date: 11/01/2013]